

licenses, an automatic, ninety-day, penalty-free grace period was available for all installment payments. The availability of this grace period was a material item that DiGiPH and other C block licensees relied upon in determining their bid amount and bidding strategy. Bidders were aware that they could be as many as ninety days late on an installment payment without incurring additional cost. The terms of the notes and security agreements executed by DiGiPH were also consistent with the availability of an automatic, penalty-free grace period.

The Third R&O now amends Section 1.2110(e) to impose a late payment fee equal to 5% of the payment if a party fails to make a scheduled installment payment on time. After ninety days, an additional 10% late payment fee is imposed. If the licensee is delinquent on payments for over 180 days, it will be considered in default and its license will automatically cancel without further action by the Commission.¹ This new rule is being retroactively applied to existing licensees, such as DiGiPH, which are currently paying for their licenses in installments. This rule change has once again materially altered the rules for C block licenses after close of the C block auction.

The Third R&O is yet another in a long series of rule changes which occurred after conclusion of the C block auction and adversely impact the terms, conditions, and ultimately the perceived value of C block licenses. Before this rule change, if a licensee was as many as ninety days late on an installment payment, the licensee incurred no additional cost. Unless this aspect of the Third R&O is reconsidered, regardless of whether a licensee is one day or ninety days late on an installment payment, the licensee is levied a 5% penalty. This change not only restricts the flexibility of licensees making installment payments, but it also imposes additional burdens and

¹Third R&O ¶¶ 103-13.

increased costs on licensees after they already acquired their licenses under more favorable, less burdensome terms.

Further, the Commission is well aware of the fragile financial condition of a large number of C block licensees.² Those not in financial straits are currently facing significant capital expenditures as they endeavor to build-out their networks. Now is hardly the time for the Commission to be adopting more stringent rules that impose additional costs on C block licensees and adversely affect their value. No evidence of abuse of the previously-authorized grace period has been presented by the Commission in the Third R&O, nor does the FCC set forth any other basis upon which to change the terms of installment payments nearly eighteen months after close of the C block auction and execution of the notes and security agreements for those licenses. Given the impact this issue will have on C block licensees, a more equitable approach would be to address this rule change in the context of the C block restructuring proceeding. Thus, a C block licensee could elect either to avail itself of the extended delinquency period with a penalty, or to remain subject to the existing rules upon which it relied in formulating its bids and business plan.

In considering this request for reconsideration, DiGiPH reminds the Commission that it is one of a minority of entities that tendered its March 31, 1997 installment payment in a timely manner. To date, DiGiPH has filed two separate documents requesting either a refund of that suspended

²See In the Matter of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, rel. Oct. 16, 1997 ("Restructuring Order").

payment, or other equitable compensation for the loss of use of those funds.³ Accordingly, it would be unjust for the Commission to view DiGiPH's Petition as an effort to shirk its payment obligations. DiGiPH only seeks to continue under the original rules upon which it relied upon in good faith and followed. In the course of a new start-up venture of this scope, however, it is not unreasonable to anticipate that individual cash-flow requirements may create a circumstance where any given installment payment might need to be delayed for a short period of time. The FCC advised C block bidders that it had taken that circumstance into account and, in submitting their bids for these licenses, C block bidders could rely upon and factor into their business plans the availability of an automatic, ninety-day, penalty-free grace period for installment payments. DiGiPH so relied, not only in formulating its bidding strategy but also in formulating its construction strategy as well.

As the Commission is aware, DiGiPH has undertaken an extremely aggressive build-out strategy for its markets. To date, DiGiPH has already satisfied its five-year construction benchmark in two of its markets, while satisfying the full ten-year construction benchmark in two additional markets.⁴ A significant consideration in DiGiPH's commitment of capital was the knowledge that, if needed, it was afforded flexibility under the Commission's rules to submit any given installment

³DiGiPH PCS, Inc. Petition for Reconsideration, Restructuring Order, filed Nov. 24, 1997; Letter to Ms. Regina Dorsey (FCC) from Ms. Walsh (Kurtis & Associates, P.C.) dated Apr. 9, 1997.

⁴DiGiPH filed FCC Forms 489 on February 10, 1998 demonstrating satisfaction of the five-year construction benchmark in the Hattiesburg, MS BTA, B186C, Station KNLF622; satisfaction of the ten-year construction benchmark in the Mobile, AL, BTA, B302C, Station KNLF618; and satisfaction of the ten-year construction benchmark in the Biloxi-Gulfport-Pascagoula, MS BTA, B042C, Station KNLF620. On February 12, 1998, DiGiPH filed an FCC Form 489 demonstrating satisfaction of the five-year construction benchmark in the Laurel, MS BTA, B246C, Station KNLF623.

payment up to ninety days late without penalty.

Finally, the Commission should also be aware that the notes, which it now seeks to materially alter almost eighteen months after their execution, are material terms to the financing secured by many C block entities enabling them to proceed with construction on the scale of DiGiPH. The Commission should consider the fact that these material changes in the terms of the notes could have a direct and adverse impact on a licensee's status under its debt which is subordinated to those notes. Retroactively applicable changes to the terms of the FCC's senior financing cannot occur without potentially exposing the licensee to adverse consequences under the terms of its secondary financing. While the Commission has found on numerous occasions that the imposition of a late fee of the magnitude applicable here is "commercially reasonable,"⁵ it is not commercially reasonable for the terms of a senior note to be unilaterally and materially altered after the fact. If the Commission proceeds with the instant rule change, it must also be fully cognizant of and prepared for the adverse consequences which it may unintentionally inflict upon licensees by this action.

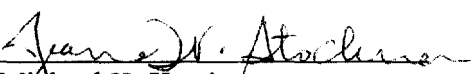
⁵Third R&O ¶ 110.

Conclusion

At a minimum, equity mandates that the FCC honor the financing terms under which licensees have bid, acquired their licenses, and incurred significant secondary debt to expedite system deployment and provide service to the public. For the foregoing reasons, DiGiPH requests the Commission to reconsider the amendments in the Third R&O and to retain its original rule which affords licensees an automatic, ninety-day, penalty-free grace period for late installment payments.

Respectfully Submitted,

DIGIPH PCS, INC.

By: 
Michael K. Kurtis
Jeanne W. Stockman
Its Attorneys

Kurtis & Associates, P.C.
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-4500

Dated: February 17, 1998